Case No. 06-3300

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA	)	Appeal from the United
	)	States District Court
Plaintiff – Appellee	)	for the Eastern District
	)	of Wisconsin
	)	
	)	
v.	)	No. 04 CR 235
	)	
	)	Hon. William C. Griesbach
STEVEN J. PARR	)	United States District
	)	Judge, Presiding
Defendant – Appellant	)	

REPLY AND RESPONSE BRIEF OF DEFENDANT-APPELLANT/CROSS-APPELLEE STEVEN J. PARR

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Oral Argument Requested

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SUMMARY OF THE REPLY

The Government essentially argues here, as it did below, that because Parr has an interest in explosives, and is prone to making provocative statements to his ex-girlfriends and neighbors that he is, in some ill-defined way, a "dangerous person," and therefore he must be guilty of the crime charged. In doing so, the Government ignores the fact that Parr was indicted for a crime of pure speech, and instead argues as if he were on trial for attempt or conspiracy to bomb a building. Parr's actual speech does not rise to the level of a true threat, because it was not even a threat. Parr's communications with his cell-mate did not contain any serous statement of an intention to do harm. The Government takes Parr's statements regarding the Reuss Federal Building out of context, in an attempt to back up its claim that Parr had a "detailed plan" to blow up the building. Read in context, these statements are nothing more than hypothetical or idle talk, or jest. The Government then relies on a dissenting opinion from this Circuit, whose views on this issue were squarely rejected by the majority, in order to justify the introduction of an array of prior bad act evidence, all designed to paint Parr in the minds of the jury as someone overly interested in Timothy McVeigh and the Unabomber.

According to the objective standard articulated by this Court, as well as many other circuit courts, whether Parr had intented to commit any bombing was not at issue and irrelevant to the question of guilt.

Additionally, the Government relies on the history of U.S.S.G. § 3A1.4 in alleging that Parr's conduct "involved a crime of terrorism" and warrants enhancement under that section, but fails to show why the terrorism enhancement should apply in light of the District Court's explicit findings that Parr's conduct was not a crime of terrorism as defined by the guidelines. The Government further fails to show that Parr's testimony was inconsistent with Agent Hammen's on its face, let alone that Parr willfully committed perjury such that enhancement was required under U.S.S.G.§ 3C1.1. The Government also fails to articulate why the Supreme Court's recent holding in *Cunningham v. California*, 127 S. Ct. 856 (2007) is inapplicable to Parr's sentence.

The Government also argues that the 10-year sentence Parr received for the statements he made is unreasonably low, and that Parr instead should have received the Government's recommended sentence of life in prison. In essence, this argument is nothing more than a facial attack on the discretion granted to district courts after *Booker* to impose sentences outside the recommended guideline range when appropriate in light of the factors articulated in § 3553(a). In addition, this argument ignores the fact that the district court here acted within the recommended Guideline range by departing downward in accord with U.S.S.G. § 1A1.1(b) which provides for downward departure when a case falls outside the "heartland" of situations meant to be addressed by a particular guideline.

ARGUMENT

I. Even the Government's selected quotations from Parr and Schultz's conversation do not rise to the level of a True Threat.

For all the Government's extended quotations from Parr's jailhouse discussion with Schultz, nowhere does the Government point to any solid, unequivocal statement that constitutes a true threat. What the Government characterizes as a "detailed plan" to blow up the Reuss Federal Building, is clearly, in context, a merely hypothetical discussion of how one might commit such a crime, see Schultz Tr. at 85-87, accompanied by hypothetical discussions of how Schultz might write a book about it and become rich, *id*. at 93-94; how one might try to minimize casualties, *id*. at 88; how Parr has no plans to do anything soon, but he might bomb a building ten years from now, *id*. *at 94*; and even if Parr were to bomb a building at some distant point in the future, he is not sure which building, or when. *Id*. at 98-99. In fact, the only firm statements that Parr makes are that he is not going to set off any explosives, unless he has the permission of the landowner, *id*. at 104, and, on the more negative side, after some pressing by Schultz, that "someone's gonna get it." *Id*. at 109. This statement alone, however, in the context of a jailhouse conversation, does not constitute a crime, much less a crime of terrorism.

In arguing to the contrary, the Government gives short shrift to the serious First Amendment concerns raised by this case. In effect, the Government concedes that its case focused on proving that Parr was a dangerous person, rather than that his statements constituted true threats. Govt. Br. at 35. This focus

explains both the Government's mischaracterization of Parr's claim as a mere attack on the sufficiency of the evidence, and the Government's insistence that the prior bad acts evidence introduced at trial constitute "direct intrinsic evidence" of the crime. *Id*. at 40. In fact, the Government claims that because Parr's case rested on proof of Parr's dangerousness, as opposed to the seriousness of the words, as in a typical hoax threat case, that somehow First Amendment concerns are mitigated. *Id*. at 35. As an initial matter, this assertion is not borne out by relevant Supreme Court case law. *See Watts v. United States*, 394 U.S. 705, 707 (1969) (finding that the First Amendment prohibited conviction in a non-hoax threat case).

Secondly, what the Government fails to address are the serious Sixth Amendment concerns that arise when the Government indicts a person for committing one crime (making a threatening statement), and then tries that person as if he were accused of an actual attempt crime, with no requirement that the Government prove each of the elements of attempt. Simply put – making a threat to blow up a building is a crime; actually blowing up a building is clearly a crime; and even attempting to blow up a building is a crime. Wanting to be "the next Timothy McVeigh" is not a crime.

II. The Government's Purported Justifications for Admitting Prior Bad Act Evidence Contradict Case Law interpreting True Threat Doctrine.

a. Whether Parr had a subjective intent and/or ability to carry out the alleged threat was not a proper issue for the Government to explore at trial.

The Government's theory of prosecution, both at trial and on appeal, has been that Parr is guilty of making a true threat because he had the knowledge and intent to actually follow through on his alleged plan. Govt. Br. at 35. In support of this theory, the Government cites Judge Will's dissenting opinion in *United States v. Hoffman*, 806 F.2d 703, 714 (7th Cir. 1986), noting that Judge Will engaged in a detailed analysis of why evidence of the sort introduced here by the Government should be relevant in a true threat case. Govt. Br. at 32-34. The glaring problem here, of course, is that Judge Will's position on these very evidentiary issues was rejected by the majority in *Hoffman*, and Judge Will's views on the relevance of these categories of evidence is not the law in this Circuit. *See Hoffman*, 806 F.2d at 707-08 (rejecting Judge Will's analysis and interpretation of true threats).

Almost every Circuit to have addressed this question has rejected the "subjective" standard advocated by the *Hoffman* dissent, in favor of an objective, reasonable person standard under which actual intent to harm is irrelevant. *See Khorrami,* 895 F.2d at 1193; *United States v. Fuller*, 387 F.3d 643, 647 (7th Cir. 2004); *United States v. Fulmer*, 108 F.3d 1486, 1492 (1st Cir. 1997); *United States v. Kelner*, 534 F.2d 1020, 1025 (2d Cir. 1976); *United States v. Malik*, 16 F.3d 45, 48 (2d Cir. 1994); *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991); *United States v. DeAndino*, 958 F.2d 146, 148 (6th Cir. 1992); *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 624 (8th Cir. 2002); *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005) (holding that true threat covers threats where a defendant intended to

threaten his victim, but is unrelated to whether he actually intended to carry out his threat). Likewise, this Circuit has held that "it is the utterance which the statute makes criminal, not the specific intent to carry out the threat." *Hoffman*, 806 F.2d at 706.

The Government also argues that the continuing discrepancy between the Circuits about whether the true threat standard should be speaker-based, or listener-based is somehow relevant to its theory. *See United States v. Saunders*, 166 F.3d 907, 913 n.6 (7th Cir. 1999). In doing so, the Government claims that this issue remains unresolved in this Circuit, and then attempts to tie the disparity to the disagreement in *Hoffman*. Govt. Br. at 34. Regardless of whether a listener or speaker-based standard is preferable as a policy matter[1], this issue bears no relation to the debate about subjective or objective standards. As previously stated, almost all circuits agree on an objective, reasonable person test in which actual intent is not relevant to a finding of guilt. *See supra.* at 5-6. Despite the Government's attempt to characterize the law as open on this point, precedent makes clear that Parr's can only be convicted if the speech itself falls outside the scope of First Amendment protection according to the objective standard espoused by this Circuit.

It is for this particular reason that this Circuit, in *Fuller*, 387 F.3d at 648, affirmed the district court's decision to exclude testimony about the subjective

[1] At trial the jury was instructed based on the objective speaker-based standard. R. 157 at 2. Parr has not challenged this instruction on appeal.

intentions of the defendant in sending a threatening letter to the President, because such information was not relevant to the question of legal guilt, and "would merely have been confusing to the jury." *Id*.

Even on appeal, the Government fails to see the difference between convicting someone of committing a criminal act – *i.e.*, making a threat against a federal building – and convicting someone of being a threat, without proving each of the elements of a traditional attempt crime.

b. Evidence of Parr's prior bad acts was not "direct" evidence, related to whether Parr's statements constituted a true threat.

The Government uses its mischaracterization of True Threat doctrine to further insist that the evidence presented was not only admissible under Fed. R. Evid. 404(b), but was instead direct, intrinsic evidence of the elements of the crime. The Government contends that a necessary element of a § 2332a offense is that the defendant's threat was a serious statement expressing an intention to do an act which would cause apprehension. *United States v. Guevara*, 408 F.3d 257-58 (5th Cir. 2005). As case law continuously reiterates, the defendant's true intentions are not at issue in cases under true threat doctrine, and are irrelevant to a finding of guilt. *Hoffman*, 806 F.2d at 707; *Fuller*, 387 F.3d at 647. The definitional requirement that a threat under 2332a be a "serious statement" which would cause apprehension differentiates the statement from those that are constitutionally protected, such as political hyperbole, joke, or mere talk. *See Guevara*, 408 F.3d at 258. It does not refer to the subjective intent to bomb the

building. *Id*; *see also Khorrami*, 895 F.2d at 1192-93. Knowledge and ability to carry out the alleged plot are similarly not at issue. *Id*.

In arguing that the proffered Rule 404(b) evidence was prejudicial only because it showed guilt, the Government once again cannot help but suggest that the evidence that establishes Parr's true intentions also establishes a "true threat". Govt. Br. at 43, 47 ("The evidence challenged by Parr was the evidence that most established his true intentions, for it is the same proof that establishes 'true threat'" and "His motions attempted to isolate his threat from the prior conduct that demonstrated his threat to be so serious"). The Government also makes no attempt to explain how the evidence related to Parr's motive, knowledge and intent ***to make a threat***, as opposed to motive, knowledge, or intent to bomb a building.

The Government cites *United States v. Hale*, 448 F.3d 971 (7th Cir. 2006), for the proposition that the defendant's favorable conduct of a person who went on a shooting rampage was admissible in a threat case. Govt. Br. at 43. However, *Hale* did not involve a "threat" to kill a judge, as the Government claims, but rather solicitation of someone else to actually harm the judge. In a solicitation case, the Government must prove: first, that the defendant intended another person to engage in violent conduct, and second, that the defendant "solicited, commanded, induced, or otherwise tried to persuade" the other person to commit a violent act. *United States v. Rahman*, 34 F.3d 1331, 1338 (7th Cir. 1994). Unlike solicitation, true threat cases do not involve proof of whether a defendant

ever intended to carry out the threat himself, or wanted anyone else to carry out the threat. *Khorrami*, 895 F.2d at 1193. Therefore, comments made by Parr about McVeigh or the Unabomber, aside from those comments in the communication that was the subject of the indictment, are not necessary or relevant to proving whether Parr's statements on another occasion were true threats. Similarly, the Government's citations to *United States v. Yousef*, 327 F.3d 56, 121-122 (2d Cir. 2003) and *United States v. Stotts*, 176 F.3d 880, 890-91 (6th Cir. 1999), are unavailing. Both of those cases involved non-threat crimes. In *Yousef*, the defendant was charged with participating in a bombing conspiracy, and in *Stotts* the defendant was prosecuted for exploding a destructive device. Evidentiary rulings in these contexts shed no light on issues of relevance or unfair prejudice where only an intent to threaten is at issue.

c. True threats are not specific intent crimes, and therefore do not fall within the "specific intent" language of *United States v. Jones*, 389 F.3d 753, 756 (7th Cir. 2004) and *United States v. Gellene*, 182 F.3d 578 (7th Cir. 1999).

The Government cites no support for its contention that violations of § 2332a are specific intent crimes.

Specific intent crimes are generally rare. As the Sixth Circuit stated in *DeAndino*, *supra.*, another true threat case, "[t]he difference between a specific intent and general intent crime involves the way in which the intent is proved -- whether by probing the defendant's subjective state of mind or whether by objectively looking at the defendant's behavior in the totality of the circumstances." 958 F.2d. at 149 (citing to analysis in *Hoffman*, 806 F.2d at 707).

Because the crime alleged here is not a specific intent crime, the Government does not need to prove knowledge and motive, and cannot take advantage of the leniency afforded the Government in introducing prior bad act evidence in order to prove the elements of those crimes. *See United States v. Jones*, 389 F.3d at 756 (noting that prior act evidence may be relevant to show intent in specific intent crimes); *Gellene*, 182 F.3d at 595. Similarly, even if the crime were specific intent, merely pointing out that fact is not alone enough to differentiate between the legitimate use of prior act evidence to show intent, and the illegitimate use to show propensity. *Jones* at 757. Here, the Government articulates no non-propensity rationale as to why this prior bad act evidence should have been admitted. *See* Govt. Br. at 43-45. In fact, the Government goes out of its way to articulate a clearly ***propensity-based*** rationale for the introduction of this evidence, stating that this evidence was necessary to differentiate Parr from a "person who makes a one-time, vague verbal threat at the federal government." Govt. Br. at 44.

Likewise, any "specific intent" that might be at issue in Parr's case would involve the intent to threaten, or the intent to communicate, rather than the intent to bomb the building. *See also Fulmer*, 108 F.3d at 1494 (1st Cir. 1997) ("The only intent requirement is that the defendant intentionally or knowingly communicates his threat, not that he intended or was able to carry out his threat"); *United States v. Worrell*, 313 F.3d 867, 874 (4th Cir. 2002) (holding that the intent element of the statute would be satisfied with proof that a defendant

intended to place a communication in the mails, not that he specifically intended to threaten or that he had the intent to carry out his threat).

d. Parr is not to blame for raising the issue of whether he intended to bomb the building.

The Government further suggests that Parr himself put his intent (or lack of intent) to carry out the alleged threat at issue by arguing that he did not intend to bomb any building, and by calling a psychologist to testify in his defense. Govt. Br. at 42. As an initial matter, this argument seems somewhat disingenuous, as the Government seeks here to blame Parr for the introduction of extensive prior bad act evidence, when in reality Parr was simply responding to the bulk of the evidence presented by the Government. *See* Govt. Br. at 39-42 (describing progress of the trial, including Parr's pre-trial attempts to exclude the Government's proffered prior bad act evidence). Given the fact that the Government continues to maintain, even on appeal, that Parr's intent to carry out the alleged threat was relevant to proving the elements of the crime charged, the Government surely cannot argue that Parr himself was not entitled to respond to this evidence at trial.

In addition, Parr's testimony was not solely focused on telling the jury that he did not intend to hurt anyone. Parr also testified that he and his cell-mate Schultz were joking during their conversation, and that Parr had no intent to scare Schultz or anyone else with what he said. Tr. 3 at 493. 501.

With regard to Parr's invocation of Fed. R. Crim. P. 12.2(b), to give notice that he wished to put his mental state at issue during the trial, and his further calling

of a psychologist to testify as to his mental state at the time the alleged threats were made, these actions cannot expand the definition of intent relevant to a true threat case. Whether Parr suffered from a certain mental condition, which might mitigate his culpability for the crime of making a true threat, is a question distinct from the issue raised by the Government – which is whether Parr had any intent to carry out this alleged threat. In fact, the psychologist's testimony here, on Parr's behalf, focused on the fact that Parr suffered from "post-traumatic stress disorder", a "mood type disorder", and was being treated with mood stabilizers and anti-psychotics, Tr. 3 at 442-44, and not on the issue of whether Parr had any intent to carry out his alleged threat.

III. The Government Fails to Engage Seriously with Many of Parr's Specific Claims of Error.

The Government summarily argues that all the evidence offered under 404(b) was admissible either as direct intrinsic evidence or as evidence of motive and intent, and fails to articulate, beyond the general, why this testimony was probative as opposed to prejudicial.

a. The government fails to articulate why extensive reference to McVeigh, outside the context of the recording, was not overly prejudicial.

Parr asserts in his opening brief that all references to McVeigh and the Unabomber, outside of those contained in the transcript, were unduly prejudicial. The Government alleges that anyone who has sought to imitate McVeigh and the Unabomber would certainly "be viewed differently from a person who makes a one-time, vague verbal threat." Govt. Br. at 43-44. Anyone

who expresses a slightly positive sentiment on these matters will clearly be "viewed differently" – this is precisely why such testimony is overly prejudicial. The mere fact that Parr and Schultz discussed McVeigh and the Unabomber does not change the emotional response that was likely to occur when the Government consistently brought Parr's political views to the forefront of the jury's minds.

b. The fact that Parr mentioned McVeigh in the recorded conversation does not mitigate the damage done by the District Court referring to him as "Mr. McVeigh" in front of the jury.

The Government further contends that the fact that the judge called Parr "Mr. McVeigh" during trial was not plain error. In support, the Government notes that the district judge apologized and corrected the error. Govt. Br. at 48. Merely saying "I mean Parr. I'm sorry", Tr. 1 at 27, cannot mitigate the effects of communicating to the jury that the judge saw Parr as equivalent to, or even similar to, Timothy McVeigh. *Rush v. Smith*, 56 F.3d 918 (8th Cir. 1995) (holding that even one comment appealing to bias or prejudice "may be sufficient to destroy the integrity of the entire proceeding").

In addition, the Government's suggestion that the District Court's comment caused no harm "since Parr himself agreed that he had linked himself to McVeigh" borders on the absurd. As discussed fully in Parr's opening brief, comments from the trial judge carry special weight with the jury, and are not to be judged as mere evidentiary errors. Parr opening Br. at 26-27. This mistake clearly shows the prejudicial effect of the Government's emphasis on McVeigh.

The fact that Parr testified that he had talked about McVeigh for the shock value does not mitigate the prejudice that this comment had upon the jury. To the contrary, at that point in trial, after the jury had heard witness after witness describe Parr as "the next McVeigh", Parr had good reason to clarify his true feelings on the subject in an attempt to reduce the inevitable emotional impact.

c. The Government fails to respond to claims that evidence from Parr's ex-girlfriends and neighbors about his interest in chemistry was not probative, and confused the issues.

The Government also fails to discuss specifically why testimony about Parr's interest in chemistry and experiments at home was probative of the crime charged. Once again, the Government relies upon the fact that "[a] defendant with knowledge of chemicals and explosives who makes a threat to blow up a federal building certainly would be differentiated from one who makes the same threat but has no knowledge of how to construct an explosive device." *Id*. at 43. Aside from the fact that Parr's actual knowledge should not have been at issue in this case, this evidence is not in any way probative of whether Parr's statements during his jailhouse conversation, a totally unrelated event, were true threats.

Experimenting with chemicals is not a crime in this country. Nor is admiring Timothy McVeigh. Allowing the Government to bring evidence outside that related to the conversation directly at issue would allow them to widen the "context" in which a true threat is to be judged to such a degree that anyone who has an interest in chemistry or has ever said anything positive about McVeigh

would automatically lose their right to First Amendment protection. It was an abuse of discretion for the District Court to allow this testimony.

d. The Government does not respond to claims that the cumulative effect of the erroneous rulings deprived Parr of his right to a fair trial.

The Government also summarily rejects the argument that the cumulative effect of the evidentiary errors was to deny Parr his right to a fair trial, responding only in a footnote, Govt. Br. at 52, and claiming that because the District Court's evidentiary rulings were not erroneous, that there was no cumulative effect on Parr's right to a fair trial.

Rather than admitting one or a few pieces of irrelevant or prejudicial evidence, the district court allowed the Government to present witness after witness testifying about Parr's odd and allegedly dangerous behavior. The amount of this evidence far outweighed the only piece of direct intrinsic evidence in this case: the recorded conversation with Schultz. By bringing this extensive evidence, the Government brought to the forefront of trial Parr's supposed political opinions about the Unabomber and Timothy McVeigh, while any statement about McVeigh and the Unabomber actually comprised a very small, and not illegal, part of Parr's actual conversation. *See United States v. Fulmer*, 108 F.3d 1486, 1498 (1st Cir. 1997**)** (holding that the trial court abused its discretion in allowing extensive reference to the Oklahoma City bombing in a true threat case, because this evidence distracted the jury from the relevant issues). Moreover, the fact that the trial judge himself referred to Parr as "Mr.

McVeigh" in front of the jury, at the beginning of the trial, compounds these errors.

IV. The Government fails to distinguish *United States v. Rogers* and *United States v. Ellis* to show why the entire copy of The Anarchist Cookbook, let alone any portion of the book, should have been admitted to the jury room.

The Government contends that The Anarchist Cookbook was properly admitted because it contained the "recipe" to actually bomb the building, and because it was necessary to rebut the defense. Govt. Br. at 45-46. Once again, the Government fails to allege how the book was relevant other than to prove that the defendant was capable of, or had knowledge of how to make a bomb.

Aside from citing *Walters*, the Government fails to respond to contentions that the jury should not have been allowed to see portions of the book that had no relation to the facts in this case. *United States v. Walters*, 351 F.3d 159, 165-167 (5th Cir. 2003), does not support the Government's contention that The Anarchist Cookbook was admissible here, but instead affirms this Court's holding in *United States v. Rogers*, 270 F.3d 1076, 1081 (7th Cir. 2001), and *United States v. Ellis*, 147 F.3d 1131 (9th Cir. 1998), that admission of The Anarchist Cookbook, because of its prejudicial effect, should be limited only to portions that directly relate to the crime at issue. *Walters* was also fundamentally different from this case, because the defendant in *Walters* was convicted of sending an actual explosive device through the mail. The court admitted portions of The Anarchist Cookbook to show that Walters had the requisite knowledge and ability to build the bomb that the victim had received. Knowledge and ability were not at issue here. Parr

was *not* on trial for building a bomb; he was also *not* on trial for planning to, or even wanting to.

The District Court originally addressed the admissibility of The Anarchist Cookbook, and various other books, in its Decision on 404(b) Evidence, at 23-25. First, the District Court adopted the magistrate judge's decision that "only those portions which are probative of the charged crime would be admissible." Decision on 404(b) Evidence at 23. The District Court explicitly discussed the *Rogers* holding, and noted that "mere possession of books containing [seditious themes] is not evidence that then possessor holds such views himself." *Id*. at 24, While holding the other books inadmissible as an initial matter, which were also admitted to the jury room along with The Anarchist Cookbook, the District Court found that what portions of The Anarchist Cookbook would be admissible would depend on showing relevance at trial, but that "[a]bsent further ruling by the court, the specific contents will not be introduced." *Id*. at 25. Despite recognizing the prejudicial danger and acknowledging this Court's precedent, the District Court allowed the entire book to go to the jury anyway.

V. Parr did object to the Government's introduction of its "bomb-making" expert, Agent Hickey, and the admission of this testimony was error.

The Government wrongly contends that Parr did not at any time raise objections to FBI Agent Daniel Hickey's expert testimony. Parr clearly objected to Agent Hickey being allowed to testify in Parr's response to the Government's Notice of Intent to Rely on 404(b) Evidence. In that response, Parr objected to Agent Hickey's testimony on the basis that it was "speculative in nature. . .and

constitute[s] inadmissible comments upon the state of mind of the defendant". Def's Response to 404(b) at 10. Parr also objected on the grounds that "No claimed expert should be permitted to invade the province of the jury by offering opinion testimony regarding what the defendant meant or knew within the context of such conversation." *Id*. at 11.

The Government further argues that Agent Hickey's testimony was necessary to explain the difficult bomb-making concepts discussed by Parr and Schultz in the recording for the lay jury. Govt. Br. at 52. The Government does not respond to Parr's contention that Hickey's testimony was too speculative to be relevant, nor does it respond to the contention that it invaded the province of the jury by exposing them to an expert's opinion about the meaning of Parr's words, which the jury was supposed to judge based on a reasonable man standard. *See Arnstein v. Porter,* 154 F.2d 464, 468-69 (2d Cir. 1946); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp*., 562 F.2d 1157, 1163-64 (9th Cir. 1977) (holding expert testimony inappropriate in copyright cases when the jury must use the reasonable person test to judge the "substantial similarity" of an item).

V. The District Court erred in enhancing Parr's base offense level for "involving a crime of terrorism" and for obstruction of justice.

a. The Government has not adequately addressed this Court's interpretation of 3A1.4, and has ignored the District Court's explicit findings that Parr's conduct was not a crime of terrorism.

A federal crime of terrorism is defined as one that was "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." 18 U.S.C § 2332b(g)(5). Application of the

3A1.4 enhancement was improper, because, as the District Court specifically found, Parr's behavior was not "calculated to influence or affect conduct of government." Sent. Tr. at 31.

In applying the enhancement, the District Court explicitly found that "the threat, which was the crime that Mr. Parr is convicted of, was not calculated to influence or affect conduct of government." *Id*. The District Court also plainly stated that "there was no crime of terrorism actually committed here", *id*. at 33, and that "[t]his was not a crime of terrorism. It does involve a crime of terrorism, but the involvement or the relationship to that crime is somewhat distant." *Id*. at 72.

In reviewing application of § 3A1.4, this Court has interpreted the word "involved" to mean "included." *United States v. Arnaout*, 431 F.3d 994, 1001 (7th Cir. 2005). According to the Sixth Circuit, which also interprets "involved" to mean "included", 3A1.4 is applicable when a defendant "committed, attempted, or conspired to commit a federal crime of terrorism" as defined by 18 U.S.C. § 2332(b). *United States v. Graham*, 275 F.3d 490, 516 (6th Cir. 2001).

Parr's threat was not a "crime of terrorism" because, as the District Court explicitly stated, Parr's conduct was not committed with the intent to intimidate or coerce government conduct. Parr was also not convicted of attempting or conspiring to commit a crime of terrorism. Therefore, application of the enhancement was error as a matter of law. *See United States v. Leahy*, 169 F.3d 433 (7th Cir. 1999) (finding 3A1.4 improperly applied when defendant did not

commit or attempt to commit a crime of terrorism, despite the fact that he had threatened to use a biological weapon).

b. The Government has failed to show, beyond a general allegation, that Parr's testimony was in contradiction to that of Agent Hammen, let alone that it rose to the level of perjury.

Additionally, it was clear error for the district court to apply a two-level enhancement under U.S.S.G. § 3C1.1 because Parr's testimony was not inconsistent with that of Agent Hammen. Alternatively, any such inconsistency did not rise to the level of perjury because the evidence was insufficient to show that the inconsistency was the result of willful misrepresentation of a material fact.

In contending that the district court properly applied the perjury enhancement, the Government points to specific testimony by Parr, and interprets that testimony as claiming that Parr told Agent Hammen that he did not intend to blow up the building. The Government further interprets Agent Hammen's testimony to indicate that "Parr never gave any such explanation." Govt. Br. at 55.

In contending that Parr's testimony was inconsistent with that of Agent Hammen, the Government misinterprets Parr's testimony and ignores certain key admissions made by Agent Hammen. While Agent Hammen did testify that during his interview with Parr he "gave [Parr] the opportunity to say that he may have been joking. . . .And he never – he never indicated that at all," Tr. 1 at 107, Agent Hammen also testified that Parr told him during the interview that he

did not intend to blow up any building. Parr confirmed this testimony, acknowledging that he had denied making certain statements to Agent Hammen during the interview, but emphasizing that he did tell Agent Hammen during the interview that he had no intention to blow up a building. Tr. 3 at 532-533.

Merely inconsistent testimony is not enough to warrant an enhancement under 3C1.1, without finding that the defendant made false testimony with the "willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory". *See United States v. Dunnigan*, 507 U.S. 87, 94 (1993); *United States v. Miller*, 159 F.3d 1106, 1112 (7th Cir. 1998). Parr's testimony does not rise to the level of perjury because it was not inconsistent with Agent Hammen's testimony, and because even if it was, the evidence does not establish that Parr willfully lied about what happened during that interview.

c. The fact that the sentencing guidelines are advisory post-*Booker* does not make the Supreme Court's decision in *Cunningham v. California* inapplicable to Parr's sentence.

Parr's sentence did violate his Sixth Amendment right to a jury trial, because it was result of a calculation under the sentencing guidelines during which the District Court judge enhanced the defendant's sentence beyond the statutory maximum, based upon facts that were not submitted to a jury, and were not included within the jury's verdict.

The history of cases leading up to *Booker*, as well as *Booker* itself, have consistently held that a court violates a defendant's Sixth Amendment right to a jury trial by imposing a sentence above the "statutory maximum," based upon

facts not submitted to a jury. *United States v. Booker*, 543 U.S. 220, 230-31 (2005); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

The Supreme Court's recent decision in *Cunningham v. California*, 127 S. Ct. 856 (2007) affirms the Supreme Court's concern about imposing increased sentences based only upon the judge's own determination that aggravating facts, when those facts have not been determined by a jury, oblige a higher sentence.

The fact that *Booker* made the sentencing guidelines "advisory" does not mitigate the Sixth Amendment concerns in circuits, such as this one, where *Booker* has been interpreted to require district courts to calculate the defendant's sentence according to the guidelines, applying enhancements based upon facts that have not been submitted to a jury, and which the judge determined based only upon a preponderance of the evidence. *See United States v. Dean*, 414 F.3d 725,730 (7th Cir. 2005); *United States v. Lister*, 432 F.3d 754, 762 (7th Cir. 2005). This is particularly true where a judge's sentence according to the guidelines in accorded a "presumption of reasonableness" on review. *See United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005). As the Court confirmed in *Cunningham*:

> [t]he reasonableness requirement *Booker* anticipated for the federal system operates *within* the Sixth Amendment constraints delineated in our precedent, not as a substitute for those constraints. Because [California's sentencing law] allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment. . . .*Booker*'s

> remedy for the Federal Guidelines, in short, is not a recipe for rendering our Sixth Amendment case law toothless.
>
> *Id*. at 870.

Based only upon his conviction for a § 2332a violation, Parr's recommended range would have been 77-96 months.[2] In order to arrive at the guideline range of 360 months to life, Judge Griesbach had to engage in findings of fact, and impose a higher sentence based upon those facts.

First, with regard to the perjury enhancement, the judge had to find, based on a preponderance of the evidence, not only that Parr lied during his testimony, but also that he did so willfully and not as the result of confusion or a faulty memory. Second, in order to impose the terrorism enhancement, the district court needed to find that Parr's behavior was calculated to influence or affect the conduct of government. The district court here imposed the enhancement despite specifically finding that Parr's statements were not intended to influence or affect government. Sent. Tr. at 31. Imposition of this enhancement resulted in a recommended range that was 27 years above the "statutory maximum" found in U.S.S.G. § 2K1.4. Thus, Parr's sentence, and specifically the application of enhancements for committing perjury and involving terrorism, violates Parr's Sixth Amendment right to a jury trial as reiterated by the Supreme Court in *Cunningham*.

[2] This is based upon 2K1.4, which was used to impose a base offense level of 24, and Parr's criminal history of category IV.

Response to the Government's Cross-Appeal

I. The District Court's sentence of 120 months was not unreasonably low. .

In the event that this Court finds error in Parr's conviction or his sentence, as articulated above, the Government's cross-appeal will become moot. In the event that this Court does come to address the Government's cross-appeal, however, Parr asserts, in the alternative, that the District Court's sentence of 10 years was not unreasonably low because the District Court properly departed downward not only within the letter of the Guidelines, but also within the parameters of discretion afforded District Courts following the United States Supreme Court decision in *United States v. Booker*, 543 U.S. 220 (2005). First, the Government contends that the District Court inappropriately challenges the "policy considerations" of 3A1.4, and second, that Parr's sentence was unreasonable.

a. The District Court did not challenge the policy considerations of the Sentencing Commission by departing downward.

The District Court did not substitute its own policy considerations for that of the Sentencing Commission, because the District Court departed according to the guidelines, which expressly allow for departures downward when the conduct of the defendant does not fit within the "heartland" of the guidelines. Departure is allowed "[w]hen a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm." U.S.S.G. § 1A1.1(b). Several times throughout the course of the sentencing hearing, the District Court noted that, "in this Court's view. . . the circumstances of this crime take it outside the heartland for the types of offenses that would fall

within that Guideline." Sent Tr. at 73. Parr's offense was not a typical hoax threat case, nor was Parr convicted of the more serous violations of § 2332a, including attempt, plan, or conspiracy to use a weapon of mass destruction. Thus, it was appropriate for the District Court to find that the "heartland" of the guidelines did not cover the unique circumstances of Parr's case.

In the alternative, and contrary to what the Government is claiming, the District Court appropriately calculated the guidelines according to post-*Booker* procedure, by calculating the offense level according the guidelines before departing downwards. In doing so, the district court specifically held that 3A1.4 did apply in this case, and calculated Parr's offense and criminal history levels accordingly. Sent. Tr. at 32-34.

Post-*Booker*, district courts in the Seventh Circuit are required to follow a two-step process for imposing criminal sentences. First, a district judge is obligated to calculate the appropriate sentencing range according to the Sentencing Guidelines. *United States v. Jointer*, 457 F.3d 686, 682 (7th Cir. 2006). During this phase, the district court must "acknowledge, and abide by, the policy choices made by Congress and by the Sentencing Commission." *Id*. Once the court has determined the appropriate advisory sentence, the district court is free to deviate from that sentence upward or downward based upon the factors set forth in 18 U.S.C. § 3553(a). *See United States v. Dean,* 414 F.3d 725, 727 (7th Cir. 2005).

The district court departed downward from the recommended sentencing range only after calculating the range according to the Sentencing Guidelines.

See Sent. Tr. at 33-34, 60-61. The district court then looked to the factors set forth in § 3553(a)[3] to determine an appropriate departure. *Id*. As in other cases, and partially because the factors listed in § 3553(a) are so open-ended, the District Court here only needed to make "an adequate statement of the judge's reasons, consistent with § 3553(a)" why the sentence is appropriate, which is reviewed on appeal only for reasonableness. *See Dean*, 414 F.3d at 729; *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005).

In this case, far from merely listing factors that might warrant departure, the District Court engaged in extensive reasoning on the record about why departure was warranted in this case. The Court appropriately and correctly stated that:

> The defendant's crime in this case, it has to be remembered, is not having blown up a Federal Building. It's not having constructed a bomb. . . . It's not having committed the crime that Timothy McVeigh committed. It's not having conspired to do so or attempted to do so."
>
> Sent. Tr. at 68.

The District Court also noted the "need to be careful that we don't punish or begin – go down the track trying to punish people for their intents because we're afraid of what they might do as opposed to what they have actually done." *Id*. at 72. Parr was not convicted for attempting to bomb a building, conspiring to, or

[3] § 3553(a) sets forth as relevant factors, (among other things): the nature and circumstances of the offense; the need to reflect the seriousness of the offense, the need to protect the public from further crimes of the defendant; and the need to avoid sentence disparities among defendants found guilty of similar conduct.

even wanting to. Imposing a sentence based on the unproven allegation that he actually intended to bomb the building would have been improper.

In addition, all of the reasons articulated were appropriately considered under § 3553(a), including the "nature and circumstances of the offense", the "seriousness of the offense", the punishment should fit the crime", the need to "protect the public from further crimes of the defendant", the need to deter others, and that the sentence not be disproportionate. *See* Sent. Tr. at 66-73. All of these factors were appropriately factored in by the District Court, and expressly considered during the sentencing hearing.

b. Parr's sentence was not objectively unreasonable in light of sentences applied, and affirmed, in similar cases.

The Government cites no cases indicating that Parr's sentence falls outside the norm for threat convictions in this Circuit, or elsewhere. On the contrary, case law shows that Parr's sentence was not disproportionate in relation to sentences imposed for similar violations. *See United States v. Stewart*, 411 F.3d 825, 828 (7th Cir. 2005) (affirming sentence of 64 months for threatening to kill a union worker and blow up the union office); *United States v. Reynolds*, 381 F.3d 404 (5th Cir. 2004) (sentence of 51 months for threat to use a weapon of mass destruction under 18 U.S.C. § 2332a).

In light of the reasons set forth by the district court and the factors listed in § 3553(a), the district court's sentence of 120 months was not unreasonably short.

CONCLUSION

Wherefore Parr respectfully requests that his conviction be vacated and a judgment of acquittal entered or a new trial ordered. Alternatively, Parr requests that his sentence be vacated and his case remanded for re-sentencing.

In the event that this Court reaches the merits of the Government's cross-appeal, Parr respectfully requests that this Court find that the District Court's sentence of 10 years was not unreasonably short.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32(a)(7)

Counsel for Appellant Steven J. Parr certifies that this brief complies with the type volume limitations of Fed. R. App. P. 32(a), as modified by Circuit Rule 32(b). This brief contains 7274 words, including footnotes, but excluding those parts of the brief exempted by Fed. R. App. P. 32(a) (7) (B) (iii), as determined by the word count feature of Microsoft Word 2003. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a) (5), as modified by Circuit Rule 32(b), and the type style requirements of Fed. R. App. P. 34(a) (6), because it has been prepared in Microsoft Word 2003 using Book Antiqua, a proportionally spaced typeface, in 12 point text for the body of the brief and 11 point text for footnotes.

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on April 23, 2007, she caused to be served two copies of the Reply and Response brief of Defendant-Appellant Steven J. Parr, as well as a digital version containing the brief, by Federal Express delivery to counsel for Plaintiff-Appellee United States, at the following address:

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